THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LT GAME INTERNATIONAL LIMITED, LT GAME INTERNATIONAL (USA) LIMITED, AND LT GAME (CANADA) LIMITED, Plaintiffs, -against- DEQ SYSTEMS CORPORATION, Defendant.	Case No. 2:13-cv-04593-WJM-MF **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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I. PRELIMINARY STATEMENT

LT Game International Limited, LT Game International (USA) Limited, and LT Game (Canada) Ltd. (hereinafter individually and/or collectively "Plaintiffs") filed a complaint in the District of New Jersey after Plaintiffs' customer and business partner, Commerce Club Casino, Inc., ("Commerce Casino") informed Plaintiffsthat DEQ Systems, Inc. ("Defendant" or "DEQ") alleged that Plaintiffs' Live Table Multi Game ("LTMG") electronic table gaming product infringed DEQ's patents. In response, Defendant filed a motion to dismiss Plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

DEQ's motion to dismiss must be denied for at least three reasons. First, this Court has subject matter jurisdiction over Plaintiffs' claims because Plaintiffs meet the Declaratory Judgment Act's "case or controversy" requirement under the Supreme Court case *MedImmune v. Genentech* and progeny. Defendant has raised a cloud of uncertainty and insecurity about Plaintiffs' rights and potential liabilities because DEQ's allegations of patent infringement, if true, would subject Plaintiffs to liability for direct and contributory infringement.

Second, the law on anticipatory filing does not apply to this case. Plaintiffs did not file a complaint in anticipation of Defendant filing a complaint and DEQ has never communicated to Plaintiffs when and/or where it intended to file a complaint. Third, Plaintiffs have alleged sufficient facts that meet the elements of Plaintiffs' claims. Plaintiffs' pleadings comport with Supreme Court precedent on Rule 8 of the Federal Rules of Civil Procedure, put Defendant on notice, and state claims upon which relief can be granted under the Rule.

In sum, this Court should deny DEQ's motion to dismiss because Plaintiffs have established subject matter jurisdiction, have not engaged in improper anticipatory filing, and their pleadings are sufficient.

II. ARGUMENT

DEQ's motion to dismiss Plaintiffs' complaint should be denied because: (1) this Court has jurisdiction over Plaintiffs claims; (2) Plaintiffs have not engaged in improper anticipatory filing, and (3) Plaintiffs' pleadings comport with Federal Rule of Civil Procedure Rule 8, and therefore dismissal under Rule 12(b)(6) is inappropriate. *See infra* Part II.A-B.

A. This Court has subject matter jurisdiction over Plaintiffs' declaratory judgment claims

Plaintiffs' declaratory judgment claims should not be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because: (1) this Court has jurisdiction over Plaintiffs' claims pursuant to the Declaratory Judgment Act; and (2) Defendant's other arguments against subject matter jurisdiction are without merit.

1. This court has jurisdiction over the subject matter of this case because Plaintiffs meet the requirements of the Declaratory Judgment Act

This Court has jurisdiction over the subject matter of this case under the Declaratory Judgment Act and Article III of the U.S. Constitution. The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction ... any court of the United States ...

may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 126 (2007). In *MedImmune v. Genentech*, the Supreme Court explained that the phrase "case of actual controversy" in the Act refers to the type of "Cases" and "Controversies" that are justiciable under Article III and articulated a test to determine whether a case or controversy exists. *See id*.at 126-27. In doing so, the Supreme Court rejected a more stringent standard for declaratory judgment that required ***"reasonable apprehension of imminent suit."*** *See Arris Group, Inc. v. British Telecommunications PLC*, 639 F.3d 1368, 1373 (Fed. Cir. 2011). Under the test articulated in *MedImmune*, a case or controversy exists when "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See MedImmune, Inc*., 549 U.S. at 127.

Though a mere adverse economic interest is insufficient to meet this standard, an adverse legal interest can support declaratory judgment jurisdiction. *See Arris Group, Inc*., 639 F.3d at 1374-75.An adverse legal interest can include an underlying legal cause of action that the declaratory defendant could have brought or threatened to bring.*See id*.at 1374. Moreover, the Federal Circuit provides that, ***"where a patent holder accuses customers of direct infringement based on the sale or use of a supplier's equipment, the supplier has standing to commence a declaratory judgment action if (a) the supplier is obligated to indemnify its customers from infringement liability, or (b) there is a controversy between the patentee and the supplier as to the supplier's liability for induced or contributory infringement based on the alleged acts of direct infringement by its customers."*** *See id.* at 1375.

Contrary to Defendant's assertion, a direct communication or threat made by a patentee to a declaratory plaintiff is not required. *See Arkema Inc. v. Honeywell Int'l, Inc.*,706 F.3d 1351, 1358 (Fed. Cir. 2013); *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 736 (Fed. Cir. 1988)(finding an accusatory letter sent to the plaintiff's customer that subsequently caused the customer to demand indemnification produced a sufficient apprehension of litigation); *Arris Group, Inc.*, 639 at 1378 (rejecting defendant's argument that no Article III case or controversy existed between the parties because defendant did not explicitly accuse plaintiff of infringement). In *Arris Group Inc. v. British Telecommunications*, British Telecommunications, the declaratory defendant, made allegations of patent infringement to one of Arris's customer. *See id.*at 1375. In response, the customer demanded that Arris indemnify them against the accusations. *Id.* at 1372.The lower court found there to be no case or controversy because the defendant's actions were directed solely towards Arris's customer and not Arris. *Id.* at 1373.The Federal Circuit disagreed, reasoning that ***"when the holder of a patent with system claims accuses a customer of direct infringement based on the customer's making, using, or selling of an allegedly infringing system in which a supplier's product functions as a material component, there may be an implicit assertion that the supplier has indirectly infringed the patent."****Id.* at 1375. The Court held that British Telecommunications's accusations against Arris's customer carried the implicit assertion that Arris was committing contributory infringement, and therefore Arris had established an actual controversy under the Declaratory Judgment Act.*See id.*at 1381.

Here, Defendant argues that the actual controversy requirement is not met because it did not directly threaten Plaintiffs. As a direct threat is not required to establish a case or controversy, this argument fails. As in *Arris*, DEQ's allegations of patent infringement made to Plaintiffs' business partner and customer, Commerce Casino, are sufficient to establish an actual controversy because if DEQ's allegations of patent infringement were true Plaintiffs would be liable fordirect and indirect infringement. The allegedly infringing product is, in whole, the product offered for sale, the product being sold, and serviced by Plaintiffs. Thus, if Commerce Casino is infringing through its use or sale of LTMG, so are Plaintiffs. DEQ's alleged willingness to relieve Commerce Casino from liability in no way removes the threat of litigation from Plaintiffs, as Defendant have not provided Plaintiffs with any waiver from liability oracovenant not to sue.

Defendant's reliance on *Microchip Technology v. Chamberlain Group* is misplaced, as *Microchip* applies the restrictive reasonable apprehension test that was overruled by *MedImmune* and is factually inapposite. In *Microchip,* the plaintiff sought a declaratory judgment of patent invalidity and unenforceability against defendant Chamberlain. *See Microchip Technology, Inc. v. Chamberlain Group, Inc.*, 441 F.3d 936, 939 (Fed. Cir. 2006). Microchip itself had no potential liability as a patent infringer and failed to identify any legal claim it believed Chamberlain Group could have brought against it. *See id.*at 943. Indeed, the parties had a covenant not to sue on the patents at issue. *Id.* at 942. Moreover, Microchip did not have a legal relationship with the customer through an indemnity agreement. *Id.* at 943 (explaining that Microchip "had only an economic interest in clarifying its customers' rights"). The ultimate issue in *Microchip* was whether the purported apprehension of its customers being sued alone could support declaratory judgment jurisdiction. *See id.*The Federal Circuit held that Microchip could not establish declaratory judgment jurisdiction because it could not be liable for any induced or secondary infringement and it did not have a legal relationship with a customer through an indemnity agreement. *See id*. at 944.

In addition to the fact that *Microchip* has been overruled, the case is factually distinguishable, as Plaintiffs, if Defendant's allegations were true, would face liability as direct and contributory infringers. Through its allegations of infringement, Defendant has raised insecurity about Plaintiffs' rights and potential liabilities. *See* Cabot Decl. ¶¶ 6-8, Feb. 17, 2014. Moreover, Plaintiffs have established a legal relationship with Commerce Casino through multiple indemnification agreements, including one specifically indemnifying against patent infringement actions brought by DEQ. *See id.*at ¶¶ 4-5, 6, 8.Thus, Plaintiffs satisfy Article III and the Declaratory Judgment Act's case or controversy requirement.

2. Plaintiffs offer for sale of the allegedly infringing LTMG product, if true, constitutes a violation under the Patent Act

Defendant's argument that Plaintiffs have not presented "any facts or evidence of sworn testimony" that they have taken any action that would be regarded as infringing is untenable. Plaintiffs' LTMG has already been sold and is currently displayed in casinos in the United States, including the Las Vegas Sands Venetian. *See id.*at ¶ 2. Indeed, it is Plaintiffs' offer for sale and contract with Commerce Casino that spurred Defendant's allegations. *See id.*at ¶ 6-7.While Plaintiffs reject Defendant's allegations of infringement, if true, Plaintiffs' ***offer for sale*** of LTMG would constitute an act of patent infringement under the Patent Act. *See* 35 U.S.C. §271(a).

3. Defendant's contention regarding anticipatory filing is misplaced

DEQ's argument that this Court should dismiss Plaintiffs' Amended Complaint because it constitutes an anticipatory filing is similarly untenable, as Defendant misinterprets the law and the facts are distinguishable. Though a complaint may be dismissed if filed in bad faith with the purpose of forum shopping, Third Circuit courts have declined to find bad faith when "litigation was in the air" but no definite date has been set. *See EEOC v. Univ. of Pennsylvania*, 850 F.2d

969, 976 (3rd. Cir. 1988); *Chartis Property Cas.Co. v. Inganamore*, Civ. No. 2:12-cv-4075 (WHW), 2012 WL 6626029, at *6 (D.N.J. Dec. 19, 2012)(finding no bad faith when the declaratory plaintiff knew the defendant would file suit at some unspecified time in the future, but did not know a definite date). In the Fifth Circuit case cited by DEQ, the court determined that the declaratory plaintiff had filed in anticipation of the defendant's filing after both parties had filed complaints in different venues.The law on anticipatory filing does not apply here, as Plaintiffs did not file a complaint with any knowledge as to when and/or where Defendant intends to file a lawsuit. Indeed, Defendant has not filed any complaint against Plaintiffs and concedes that they have never communicated to Plaintiffs where or when they intend to do so. *See*Laliberté Decl., Dkt. #20, Attachment 1¶ 6.Further, Plaintiffs' choice of New Jersey as a venue is convenient for both parties. This Court has general jurisdiction over Defendant, as Defendant continuously and systematically does business in the State New Jersey, and as far as Plaintiffs are aware, this is the closest venue with jurisdiction over Defendant.

4. Service of Process is irrelevant to the subject matter jurisdiction inquiry

DEQ's discussion of service of process is irrelevant to the issue of subject matter jurisdiction. Nevertheless, Defendant has been both served in person and *served* consistent with the protocols of the Hague Convention, which Defendant has not challenged.

B. Plaintiffs' Amended Complaint sufficiently states claims for declaratory judgment ofpatent infringement, patent invalidity, tortious interference, and misappropriation of trade secrets

All of Plaintiffs' claims meet the requirements of Federal Rule of Civil Procedure Rule 8 and therefore dismissal under Rule 12(b)(6) is inappropriate.Rule 8 only "requires a short and plain statement of the claim showing that the pleader is entitled to relief." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court clarified in *Twombly*, "We do not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id.* at 569.The text of Rule 8(a) has not been changed since the initial promulgation of the Federal Rules of Civil Procedure in 1938. In relevant part, itprovides that a pleading include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The touchstone of a court's inquiry is plausibility, not probability, and whether a defendant is on notice of a claim for relief, not whether that claim has been pled with specificity or particularity.*See, e.g., Ashcroft v. Iqbal,*556 U.S. 662, 678 (2009); *West Perm Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3rd Cir.2010)(noting that "*Twombly's* plausibility standard" does not function as a "probability requirement in complex cases"). The Third Circuit has made clear that even after *Twombly*, a plaintiff need not "present 'detailed factual allegations' in a complaint in order to cross 'the line from conceivable to plausible.'" *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3rd. Cir. 2008). Moreover, *Twombly* endorses the use of "either direct or inferential allegations regarding all the material elements necessary to sustain recovery." *See Haspel v. State Farm Mut. Auto. Ins. Co*., 241 Fed.App'x 837, 839 (3rd Cir. 2007) (quoting *Twombly*, 550 U.S. at 562).

1. Plaintiffs have sufficiently stated a claim for declaratory judgment of patent non-infringement and invalidity

Plaintiffs' pleadings for non-infringement and invalidity are sufficient. A pleading for declaratory judgment of non-infringement need only satisfy the requirements of Form 18. *SeeMcZeal v. Sprint Nextel Corp.,* 501 F.3d 1354, 1356–57 (Fed.Cir.2007); *Cronos Technologies, LLC v. Vitamin Shoppe, Inc.*, C.A. No. 12-444-LPS, 2013 WL 1294423, at *1 (D. Del. Mar .29, 2013). Form 18 includes the following example of a sufficient allegation: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court."*See* FRCP Form 18.

Here, Plaintiffs have identified LTMG as the allegedly infringing product, the sale and offer for sale of LTMG as the allegedly infringing activity, and U.S. Patent Nos. 6179710, 6638167, and 6217447 as the allegedly infringing Patents. Plaintiffs' allegations provide Defendant with ample notice and satisfy Form 18's pleading requirements and that is all the law requires.

2. Plaintiffs have stated a claim for tortious interference

Defendant presents no cogent argument as to why Plaintiffs' tortious interference claim should be dismissed.A party claiming tortious interference must demonstrate: (1) that the plaintiff had a reasonable expectation of an economic benefit or advantage; (2) the defendant knew of the plaintiff's expectancy; (3) the defendant wrongfully and intentionally interfered with this expectancy; (4) a reasonable probability that but for defendant's wrongful interference, the plaintiff would have realized the economic benefit; and (5) the plaintiff was injured as a result of the defendant's conduct. *See Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc*.,256 F.Supp.2d 249, 288 (D.N.J. 2003). The requirements for tortious interference with prospective economic advantage and tortious interference with contractual relations are identical except that the tortious interference with contractual relations claim requires proof of an existing contract. *See Vibra-Tech Engineers, Inc. v. Kavalek,* 849 F.Supp. 2d 462, 492 (D.N.J. 2012).

Plaintiffs' pleading of its claim for tortious interference with prospective and current business contracts is sufficient. The declaration of DEQ's Legal Affair Manager, Renaud Laliberté, conveniently refers only to whether Defendant knew if Plaintiffs have ***sold*** LTMG, and leaves out that Defendant was aware of Plaintiffs' offer for sale of LTMG to Commerce

Casino and that DEQ advised Commerce Casino that Plaintiffs' LTMG infringed Defendant's patents-in-suit. *See* Dkt. #20, Attachment 1 ¶ 6.

As a result of Defendant's allegations, Plaintiffs' bargaining and negotiation power has been compromised, Plaintiffs' deal and contract with Commerce Casino was stalled, and Plaintiffs have incurred additional indemnification costs and exposure liability. *See id.* at ¶¶ 7-8. Also, Defendant's decision to make its patent infringement allegations to Commerce Casino instead of directly to Plaintiffs is evidence of DEQ's intention to interfere with Plaintiffs' relationship and contract with Commerce Casino. Defendant's argument that this cause of action is moot given the relationship of the parties is without merit. The fact that DEQ also has a business relationship with Commerce Casino in no way lessens the impact of their tortious interference and in fact only shows that Commerce Casino would be more likely to view DEQ's allegations as credible. Accordingly, Plaintiffs pleading of this claim is sufficient.

3. LT Game International Canada's claim for misappropriation of trade secrets is sufficient

Under New Jersey common law, to establish a claim for misappropriation of trade secrets a plaintiff must establish the following six elements:(1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employees breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret."A claim of misappropriation of trade secrets does not require specific pleading of the precise information that constitutes the trade secret in order to survive a motion to dismiss."*See Oswell v. Morgan Stanley Dean Witter & Co.*, No. 06-5814, 2007 WL 1756027, at *6-7 (D.N.J. June 18, 2007).

In *Oswell v. Morgan Stanley Dean Witter & Co., Inc.*,the defendant moved to dismiss the plaintiffs misappropriation of trade secret claim under Federal Rule of Civil Procedure Rule 12(b)(6). *See id.*at *3. The allegations made by the plaintiff stated that she made "certain confidential business ideas and trade secrets" related to her plans for developing a property as a casino. *Id.* at *6. The plaintiff alleged that these ideas were trade secrets, were conveyed in confidence, and constituted "business information not generally known to the public" which gave the defendant an advantage over competitors. *See id.*Though the plaintiff's allegations did not specify which information constituted a trade secret, the court held that even these minimal facts were sufficient to survive a motion to dismiss. *Id.*

Here, Plaintiff LT Game International Canada's misappropriation of trade secrets claim is sufficient to survive a motion to dismiss. The complaint identifies the trade secrets as "software, hardware, source code, and technical and business know-how related to a computerized playing card dealing shoe." The complaint states the steps taken to safeguard the trade secret and why the trade secret was of value. The complaint describes that Defendant used the trade secrets in its "Hawk Intelligent Shoe" without Plaintiff's consent and that as a result,Plaintiffsuffered monetary damages and injury to its business. Contrary to Defendant's contention, the facts provided by Plaintiff are not conclusory, but instead identify the types of trade secrets misappropriated by Defendant, and specifically how they were used. As in *Oswell*, these types of facts are sufficient to provide Defendant notice and survive a motion to dismiss.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submits that this Court should deny Defendant's motion to dismiss Plaintiffs' Amended Complaint.

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Meredith & Keyhani, PLLC

s/Darius Keyhani
5 Independence Way
Suite 300
Princeton, NJ 08540
Telephone (609) 945-7406
Facsimile: (609) 228-4031
dkeyhani@meredithkeyhani.com
www.meredithkeyhani.com